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STATE OF MONTANA  
BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION  
NANCY KEENAN  
\*\*\*\*\*  
WENDOLYN J. LEONE and )  
CAROL ZARN, ) OSPI 175-89  
Appellants )  
vs. ) DECISION AND ORDER  
TRUSTEES, BIG HORN COUNTY )  
SCHOOL DISTRICT NO. 2, )  
Respondent. )  
\*\*\*\*\*

STATEMENT OF THE CASE

Leone and Zarn were non-tenured teachers in Big Horn County School District No. 2. In 1989 their contracts were terminated. The terminations were appealed to the Big Horn County Superintendent pursuant to Sections 20-4-204, 20-4-206, 20-3-324, 20-3-305, 20-3-308 and 20-3-322, MCA. A consolidated hearing of the Leone and Zarn cases was held on June 8, 1989.

County Superintendent Snively issued Findings of Fact, Conclusions of Law and Order on July 20, 1989. She dismissed the appeal but also found the Respondent complied with the legal requirements of Section 20-4-206, MCA, and affirmed the decision of the Respondent. Leone and Zarn appealed this decision to this State Superintendent on August 17, 1989. The parties submitted briefs and oral argument was heard on January 9, 1990.

1 The issues on appeal are:

2 1. Whether there is reliable, probative and substantial  
3 evidence on the whole record which support the conclusions of the  
4 County Superintendent.

5 2. Whether the County Superintendent erred in denying  
6 evidence or argument to be presented on the issues of an adequate  
7 hearing and validity of the trustees' decision.

8 DECISION AND ORDER

9 Having reviewed the complete record, this State Superintendent  
10 now makes the following decision: The County Superintendent erred  
11 in dismissing the appeals and in denying a hearing on the issues.  
12 This matter is remanded to the County Superintendent with  
13 instructions to conduct a proper evidentiary hearing in compliance  
14 with administrative procedure and law.

15 MEMORANDUM OPINION

16 The standards for review by the State Superintendent are  
17 set forth in 10.6.125, ARM, which reads as follows:

18 (1) The state superintendent of public instruction  
19 may use the standard of review as set forth below and  
shall be confined to the record.

20 (2) In cases of alleged irregularities in procedure  
before the county superintendent not shown on the record,  
21 proof thereof may be taken by the state superintendent.

22 (3) Upon request, the state superintendent shall  
hear oral arguments and receive written briefs.

23 (4) The state superintendent may not substitute her  
judgment for that of the county superintendent as to the  
weight of the evidence on questions of a fact. The state  
24 superintendent may affirm the decision of the county  
superintendent or remand the case for further proceedings  
25

1 or refuse to accept the appeal on the grounds that the  
2 state superintendent fails to retain proper jurisdiction  
3 on the matter. The state superintendent may reverse or  
4 modify the decision if substantial rights of the appellant  
5 have been prejudiced because the findings of fact,  
6 conclusions of law and order are:

7 (a) in violation of statutory authority of the  
8 agency;

9 (b) in excess of the statutory authority of the  
10 agency;

11 (c) made upon unlawful procedure;

12 (d) affected by other error of law;

13 (e) clearly erroneous in view of the reliable,  
14 probative and substantial evidence on the whole record;

15 (f) arbitrary or capricious or characterized by  
16 abuse of discretion or clearly unwarranted exercise of  
17 discretion;

18 (g) because findings of fact upon issues essential  
19 to the decision were not made although requested.

20 This rule was modeled upon Section 2-4-704, MCA, and the  
21 Montana Supreme Court has interpreted the statute and the rule to  
22 mean that agency (County Superintendent) findings of fact are  
23 subject to a clearly erroneous standard of review and that  
24 conclusions of law are subject to an abuse of discretion standard  
25 of review. Harris v Bauer, \_\_\_Mont. \_\_\_, 749 P.2d 1068, 1071, 45  
St. Rptr. 147, 151, (1988); City of Billings v. Billings  
Firefighters, 200 Mont. 421, 430, 651 P.2d 627 (1982). Further,  
the petitioner for review bears the burden of showing that they  
have been prejudiced by a clearly erroneous ruling. Terry v.  
Board of Regents, 220 Mont. 214, 217, 714 P.2d 151, 153 (1986)  
citing Carruthers v. Board of Horse Racing, \_\_\_Mont. \_\_\_, 700 P.2d  
179, 181, 42 St. Rptr. 729 (1985). Findings are binding on the  
Court and not "clearly erroneous" if supported by "substantial  
credible evidence in the record." Id. This has been further

clarified to mean that a finding is clearly erroneous if a "review of the record leaves the court with the definite and firm conviction that a mistake has been committed." Wage Awwael v. Bd. of Personnel Appeals, \_\_\_Mont. \_\_\_, 676 P.2d 194, 198 (1984). A conclusion of law is controlling if it is neither arbitrary nor capricious, City of Billings, 651 P.2d at p. 632.

The difficulty I face in reviewing this case is that although the County Superintendent made extensive findings of fact and conclusions of law, a review of the record reveals that no evidence was admitted. Evidence (facts) is placed in the record by various means--sworn testimony, affidavit, stipulation of the parties. Affidavits and stipulations must be entered by the parties and admitted by the County Superintendent. The record before the County Superintendent consists of briefs with attachments and oral arguments of the parties, none of which is evidence. Briefs are merely persuasive argument of the parties and cannot be used by the hearing officer as evidence. Although the parties presented a consolidated stipulated findings of facts, it was not admitted into evidence by the County Superintendent. Using the standards of review (as set forth above) that are mandatory on this reviewing agency, I am confined to the record. There is a need for a more developed record. There is no "substantial credible evidence". Petitioners have carried the burden of showing that they have been prejudiced by a clearly erroneous ruling.

1 The County Superintendent in her Notice of Scope of Hearing  
2 dated May 23, 1989, denied Petitioner's Motion to Expand Scope of  
3 hearing and refused to assume jurisdiction over issues which  
4 basically comprise whether the decisions of the trustees were  
5 valid in that they allegedly were made without a proper quorum.

6 The Montana Supreme Court in Canvon Creek Education  
7 Association v. Board of Trustees, Yellowstone County School  
8 District No. 4, 47 St.Rptr. 93 (1990), citing Throssell v. Board  
9 of Trustees, 757 P.2d 348, 45 St. Rptr. 1228 (1988), held that  
10 unless a claimant's cause of action falls under the three  
11 exceptions enumerated in Throssell, the administrative process  
12 must be completed before resorting to the courts. These  
13 exceptions are situations where state agencies have been directly  
14 granted primary jurisdiction, where the matter is governed by a  
15 specific statute or where the board has acted without or in excess  
16 of its jurisdiction. Throssell, 752 P.2d at pp. 349-50. This  
17 line of cases gives us a very broad definition of "controversy"  
18 as it is used in 20-3-107, MCA.

19 The County Superintendent is charged with hearing and deciding  
20 all matters of controversy arising in her county as a result of  
21 decisions of the trustees of a district in the county. Section  
22 20-3-107, MCA. In order for the County Superintendent to hear and  
23 decide a matter of controversy arising as a result of a decision  
24 of the trustees of a district, the question of whether a board has  
25 authority to make a decision in the first instance must be

inswered. All business of a board of trustees must be transacted  
it a properly called meeting by a quorum (majority) of the  
membership. Section 20-3-322(4), MCA. In the presence of the  
alleged facts, Section 20-3-308, MCA, appears to be applicable,  
and except for (g), the provisions are self executing. This is  
a question within the broad case and controversy jurisdictional  
authority of the County Superintendent.

In Canvon Creek, the Court found that the County  
Superintendent was the proper forum to hear a question of breach  
of a collective bargaining agreement. In the case at hand, the  
County Superintendent must take evidence and determine the terms  
of the collective bargaining agreement applicable to termination  
of Leone and Zarn. It appears from the stipulated facts that  
there is dispute as to whether termination should proceed under  
Section 20-4-204 or 20-4-206, MCA. Only after a proper  
evidentiary hearing can she examine the facts of the termination  
and conclude as a matter of law whether the trustees acted in  
compliance with statute as interpreted by the Montana Supreme  
Court in Birrer v. Trustees, Wheatland County School District No.  
15, 47 St.Rptr. 247 (1990), Harris v. Trustees, Cascade County  
Schools Districts No. 6 and F, 47 St.Rptr. 260 (1990), and this  
State Superintendent in Whalon v. Trustees, Roosevelt County  
School District No. 64, OSPI 173-89, decided March 23, 1990.

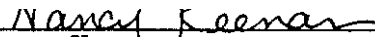
In summary, the County Superintendent upon remand must hold  
an evidentiary hearing to determine the following:

1 Whether there was a duly constituted quorum and  
2 properly convened board meeting; and if so,

3 What procedure was mandated by law and/or contract  
4 to be followed for the termination of the Leone and  
5 Zarn; and

6 Whether proper procedure was followed.

7 DATED this 12 day of April, 1990.

8   
9 Nancy Keenan  
10 State Superintendent

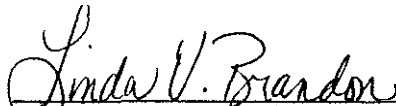
11 CERTIFICATE OF SERVICE

12 THIS IS TO CERTIFY that on the 12<sup>th</sup> day of April, 1990, a  
13 true and exact copy of the foregoing DECISION and ORDER was  
14 nailed, postage prepaid, to:

15 Carey E. Matovich  
16 MATOVICH, ADDY & KELLER, P.C.  
17 313 Hart-Albin Building  
18 Billings, MT 59101

19 Jock B. West  
20 WEST & CASPER, P.C.  
21 Suite 210; First Citizens Bank Building  
22 2812 First Avenue North  
23 Billings, MT 59101

24 Roberta Snively  
25 Big Horn County Superintendent  
Big Horn County Courthouse  
Drawer H  
Hardin, MT 59034

  
Linda V. Brandon  
Paralegal Assistant  
Office of Public Instruction